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In the Supreme Court of the United States

OCTOBER TERM, [redacted]1950

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., AND WILLIAM PATTERSON,
PETITIONERS,
v.
NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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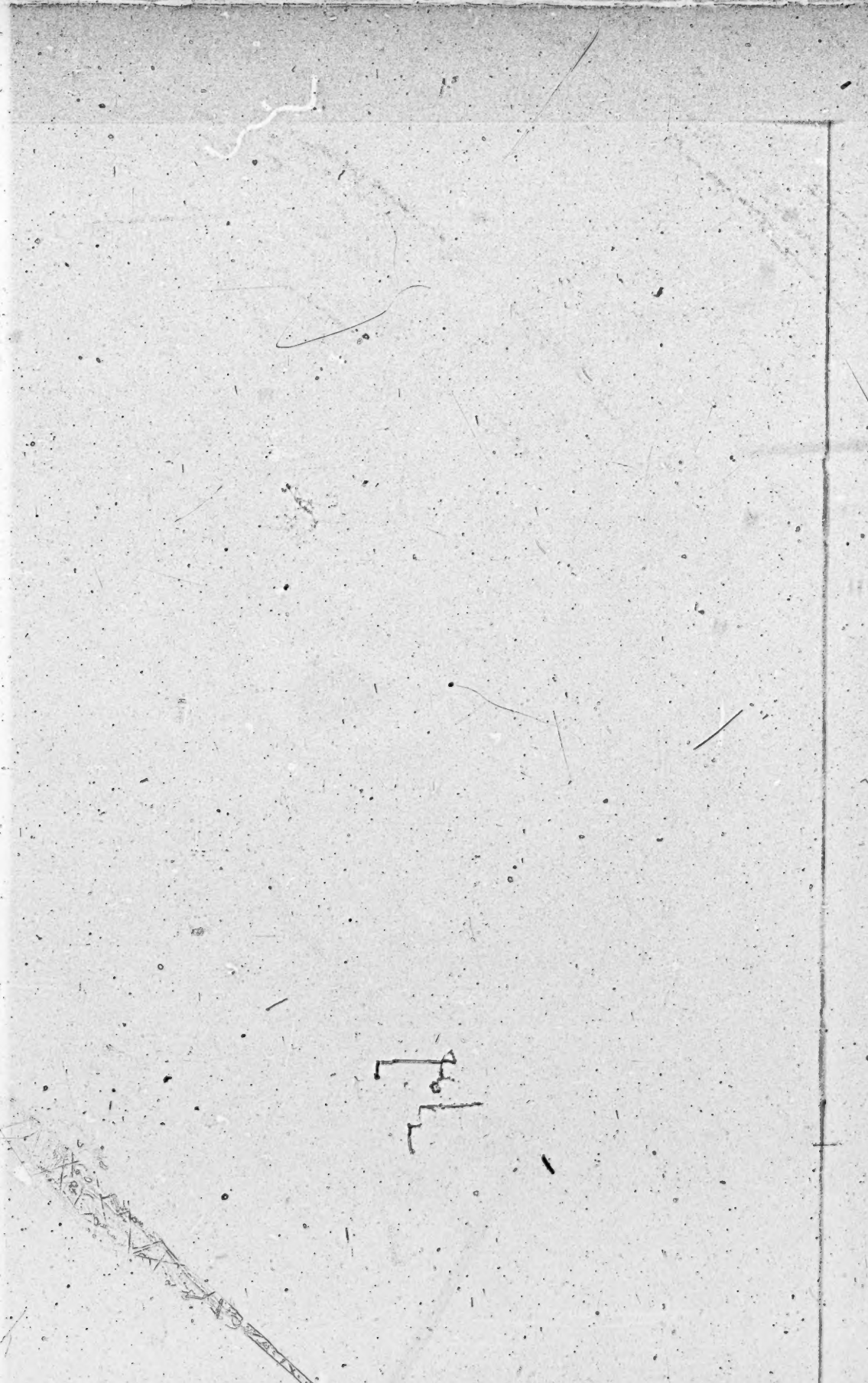

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No.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., AND WILLIAM PATTERSON, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., AND WILLIAM PATTERSON FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered April 6, 1950 (R. 336-337), affirming, by a divided court of two to one, an order made by the National Labor Relations Board, by a divided Board of three to two, declaring petitioners to have been guilty of unfair labor practices under Section 8(b)(4)(A) of the Labor Management Relations Act, 1947, generally known as the Taft-Hartley Act (herein referred to as the "Act").

OPINIONS BELOW

The opinion of the Court of Appeals (R. 323) is reported officially at 181 F.(2d) 34. The findings of fact, conclusions of law and order of the Board issued April 12, 1949 (R. 295-300) are reported in 82 N.L.R.B. 1028. The Trial

Examiner's intermediate report and recommended order, issued December 31, 1948, are reported in 82 N.L.R.B. 1028, 1031 *et seq.*

JURISDICTION

The decree of the Court of Appeals was entered on April 6, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The original proceeding to review the order of the Board was filed by the petitioners under the provisions of Section 10 (f) of the Act.

On April 17, 1950 the Court of Appeals entered an order staying execution of the decree on condition that the application for a writ of certiorari to the Supreme Court of the United States be filed within thirty days from April 17, 1950.

On May 15, 1950 it was further ordered that the Board show cause on the 5th day of June, 1950 why the decree should not be withheld pending final determination of the petitioners' application for a writ of certiorari and that the enforcement of the decree be stayed pending final determination of the motion to show cause.

QUESTIONS PRESENTED

The following questions are presented:

1. Whether the picketing in this case constituted a secondary boycott in violation of Section 8 (b)(4)(A) of the Act.
2. Whether the Board's order to the local union and its representative, as affirmed by the U. S. Court of Appeals for the Second Circuit, to cease and desist from picketing, violated the First Amendment to the Constitution.
3. Whether the labor dispute affected commerce within the meaning of Section 2, subsections (6) and (7).
4. Whether the Court erred in issuing a blanket order on the findings of the Board in this case.

STATUTE INVOLVED

The pertinent provisions of the Act (61 Stat. 136, 29 U.S.C., Supp. II, 141, *et seq.*) are set forth in the Appendix *infra* pages 45 to 50.

STATEMENT

Local Union No. 501 of the International Brotherhood of Electrical Workers, A. F. of L. (hereinafter referred to as "the local") is a subordinate local having jurisdiction in the County of Westchester in the State of New York, and in the Town of Greenwich, County of Fairfield, and State of Connecticut, having its office in the City of Mount Vernon, County of Westchester and State of New York, within the Southern District of New York.

Patterson is the agent or business representative of Local Union No. 501, residing in the City of White Plains, County of Westchester and state of New York, within the Southern District of New York.

On June 16, 1948, Samuel Langer residing at Port Chester, Westchester County, New York, filed an amended charge with the National Labor Relations Board, (hereinafter referred to as "the Board"), wherein he charged that Local 501, and Patterson (hereinafter referred to as "petitioners"), had been and are engaged in unfair labor practices within the meaning of Section 8 (b) subsections (1) (A) and (4) (A) of the Act.

On June 24, 1948 the Board, through its Regional Director for the Second Region, issued and served a complaint upon petitioners alleging that:

> "The acts of (petitioners) constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) subsections (1) (A) and (4) (A) and Section 2 subsections (6) and (7) of the Act" (R. 9).

In March 1948, and ensuing months, a one family, private

residence was being constructed in the Town of Greenwich in the State of Connecticut (R. 77).

The Giorgi Construction Company had the general contract for this job, and sublet various portions of the work, to wit; the carpentry work to Nicholas Deltorto, and the electrical work to Samuel Langer, the complainant herein (R. 39, 40, 41).

The gross amount of Langer's electrical subcontract was $325.00 (R. 53) on a total general contract of $15,200, covering the entire cost of the dwelling (R. 40).

All of the electrical work performed by Langer on this job was done by non-union labor (R. 92).

The testimony taken at the hearings before the Trial Examiner conclusively established that Langer was a persistent employer of non-union labor; that at one time he operated under an agreement with Local Union No. 501, by which he agreed to employ only union labor but, while operating under such agreement, he persisted in employing non-union labor, as a result of which his agreement was abrogated (R. 92, 93).

A day or two prior to April 16, 1948, Patterson visited the job and ascertained that the electrical work was being done by Langer with non-union labor.

On April 16, Patterson returned to the job and found the non-union condition still existed. He thereupon went to his auto, took out a placard reading "This job is unfair to organized labor; I.B.E.W. 501 A.F.L.", donned the placard and began to walk up and down in front of the job (R. 162).

Two carpenters who were then working on the job in behalf of the subcontracting carpenter, Deltorto, shortly after ceased work and left the job (R. 161).

That evening Patterson telephoned Giorgi, the general contractor, and told him that the job was unfair; that

Langer was non-union and that probably no other skilled trades would work on the job (R. 46, 47).

Langer had commenced and completed the "roughing in" electrical work on the dwelling but had some additional work to perform on his $325.00 contract. There is testimony showing that Langer finished about 60% of the electrical work for which he had contracted and that approximately 40% remained to be performed (R. 248; 53).

There was not a scintilla of evidence at the hearing to indicate that any of the journeymen employed on the job were ordered off the job by Patterson or any other person. The picketing was entirely peaceful.

I

The Trial Examiner's Intermediate Report and Recommended Order.

The Trial Examiner found that Samuel Langer was engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act (R. 283). He conceded that the value of materials used and intended to be used by Langer on the house was not large (R. 248), but based his findings on the conclusion that "numerous strands in the web of commerce, several of which crossed state lines, were interlaced in the construction of the Greenwich house" (R. 251). There was no direct evidence on the amount of materials used or allocated for use in the performance of the $325.00 electrical contract (R. 248 fn. 12). The Trial Examiner relied on the interstate status of the companies supplying Langer (R. 249 - 250), Langer's total annual business of $24,443.96 and the value of materials secured from points outside the State of New York by Langer in connection with his general business (R. 248). Similar reasoning was applied to the status of Giorgi and Deltorto (R. 246 - 247).

The Trial Examiner recommended the dismissal of the allegations in the complaint alleging violation of Section 8 (b) (1) (A) of the Act together with the allegations in the complaint alleging that respondents threatened to induce and encourage employees of other employers to engage in violation of Section 8 (b) (4) (A) of the Act (R. 260 - 265; 283).

He also recommended dismissal of the main allegation in the complaint alleging violation of Section 8 (b) (4) (A) with respect to the Greenwich job on the ground that Patterson's picketing on April 16, 1948 was an expression of views, argument or opinion and the dissemination thereof in written and visual form, containing no threat of reprisal or force or promise of benefit and that such picketing by virtue of the protection of Section 8 (c) did not constitute an unfair labor practice (R. 281). The Trial Examiner stressed the fact that the picketing was not a joint enterprise and the evidence revealed no covenant between the electrical worker and the carpenter either directly or through the Westchester Building Trades Council requiring each to respect the other's picket line and concluded that the implicit threat and promise is of the same general nature which it can be argued is embodied in every appeal for assistance by any person or group sharing a common interest with any other person or group (R. 280 - 281).

II

The Board's Decision and Order.

The Board divided three to two on the question of whether jurisdiction should be asserted. The two dissenting members of the Board stated that: "We believe the operations involved in this case constitute an essentially local enterprise with only the most remote effect upon commerce. Consequently, we do not desire to exercise our discretion to assert jurisdiction."

The majority of the Board ordered that the complaint be dismissed insofar as it alleges: "(1) that the respondents (petitioners herein) violated Section 8 (b) (4) (A) by threatening to induce or encourage employees of employers other than Nicholas Deltorto or Giorgi Construction Company to strike or refuse to perform service in order to force said other employers to cease doing business with Samuel Langer and (2) that the respondents (petitioners herein) violated Section 8 (b) (1) (A) of the Act."

The majority of the Board ruled, however, that Section 8 (c) does not immunize peaceful picketing under the circumstances of this case and held that petitioners had violated Section 8 (b) (4) (A) of the Act by picketing the Greenwich job on April 16, 1948.

III

The Decision in the Court Below.

The Court of Appeals affirmed the order of the Board in an opinion issued February 24, 1950 by a divided vote of two to one and entered its decree on April 6, 1950. The Court stayed its order pending the filing of the petition for writ of certiorari by an order dated April 17, 1950, and by a further order dated May 15, 1950.

The Court ruled that the appeal must be decided on the merits because insignificant as Patterson's acts were, they were enough to satisfy the jurisdictional demands of the Act. The Court relied upon the fact that Langer had to go from New York to Connecticut in order to perform his part of the work, small though it was and that he had to bring materials from New York for use on the job. There was also reliance upon Langer's general business and the fact that Giorgi's headquarters were also in New York, that he had to bring materials from New York and that his general business extended into other states in substantial amounts.

The Court held that Patterson's purpose was to force Giorgi to "cease doing business with Langer" and that a distinction could not be made on the issue of the secondary boycott as between a third person engaged in a common venture with the employer and a third person dealing independently with the employer. In particular, the Court interpreted the phrase "doing business" as ordinarily covering any business which the third party is free to discontinue regardless of whether he is merely supplying the material to the employer or has subcontracted with the employer to perform part of the work which the third party has himself contracted to do.

The Court conceded that "certain situations are, however, to be distinguished." Three types of cases were listed: (1) Where the work of the employer may be so enmeshed with that of the third party that it is impossible to picket one without picketing the other; (2) A strike which has for its purpose a dual pressure on the third person and the employer; (3) Where the third person is only a disguise for the employer.

The dissenting Judge was of the opinion that the picketing should be held permissible and enforcement of the order refused on the ground that it did not constitute a secondary boycott within the meaning of Section 8 (b) (4) (A) of the Act. He relied upon the general legislative history with respect to the intent of Section 8 (b) (4) (A) as illustrated by Senator Taft's statement concerning this section: "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and an employee" (93 Daily Congressional Record 4323, April 29, 1947).

He pointed out that the immediate cause of the labor dispute in the instant case was Giorgi's act of bringing on

to the Greenwich job—which he controls—a non-union electrical sub-contractor. It was his opinion that Giorgi's act of giving Langer the contract is the very heart of the matter; and if the Union is barred from reaching Giorgi at all, its traditional weapons are blunted and perhaps destroyed. He considered that it is legitimate union activity within the scope of the Act for Patterson to set a picket line which would reach Giorgi within its direct orbit and Deltorto as enmeshed with Giorgi.

The dissenting Judge emphasized the inconsistency of the instant decision with the decisions of the National Labor Relations Board in *Ryan Construction Corporation*, 85 N.L.R.B. No. 76 and *Pure Oil Co.*, 84 N.L.R.B. No. 38. He also relied upon a decision of this court in *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe*, 315 U. S. 722, 728; *Douds v. Metropolitan Federation of Architects, Engineers, Chemists Local 231*, 75 F. Supp. 672 (S. D. N. Y.) as recognized by *N.L.R.B. v. Wine, Liquor and Distillery Workers Union*, 178 F. 2nd 584 (2nd Cir.), and *Mills v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada*, 83 F. Supp. 240, 245 (W. D. Mo.).

The Court further held that Section 8 (c) does not immunize the conduct which was the subject of the Board's action and stated its opinion that Section 8 (c) applies, if at all, to cases where discursive argument accompanies language of inducement to act in violation of the statute. The Court also held that the inducement of individuals to withdraw from their employment was as much a violation not protected by Section 8 (c) as inducement of a union to call a strike in violation of Section 8 (b) (4) (A). The Court further held that Section 8 (b) (4) (A) and Section 8 (c), as interpreted by it, did not violate the First Amendment to the United States Constitution.

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the primary picketing of the single construction job involved in this case constituted a secondary boycott in violation of Section 8 (b) (4) (A) of the Act.
2. The court below erred in failing to hold that the order in this case violates the First Amendment to the Constitution.
3. The court below erred in holding that Patterson's acts affected commerce within the meaning of Section 2, subsections (6) and (7) of the Act.
4. The court below erred in issuing a blanket order on the Board's findings in this case which dismissed the complaint insofar as it related to any alleged violations of the Act with respect to employers other than the employers on the particular construction job.

REASONS FOR GRANTING THE WRIT

1. The court below held by a divided vote that the labor activities in this case constituted a secondary boycott prohibited by Section 8 (b) (4) (A) of the Act. This decision presents an important question of Federal law which should be, but has not been, settled by this Court.

The traditional means employed by the labor unions in the building and construction industry to organize has been through the picketing of unfair jobs. As stated by the dissenting Judge below, the decision of the majority has the effect of blunting and perhaps destroying the traditional weapons of the union (R. 333).

Obviously, this is a matter of vital importance to all the unions, employers and employees in the building and construction industry. The concern of labor over this question of Federal law is made even more acute by reason of the fact that the National Labor Relations Board and its General Counsel have found it impossible to apply the repre-

sentation election procedures of the Labor Management Relations Act, 1947, to the building trades. Thus, while the usual method for securing organization is denied by the decision of the majority in this case, the alternative provided for all other unions in industries subject to the Act is likewise denied to the unions in the building trades because of the impracticability of the election procedures of the Act which were fashioned for other industries.

The Langer case was decided by the National Labor Relations Board on April 12, 1949 (R. 299). More recent decisions of the National Labor Relations Board on similar issues of law have created a considerable area of doubt as to its own position. The Board has decided in the *Ryan Construction Corporation case,* 85 N.L.R.B. No. 76, 24 L.R.R.M. 1424, that primary picketing of the employer's premises does not constitute a secondary boycott even though it affects another employer engaged in the performance of work on the same premises.

In this case, the UE picketed the plant of the Bucyrus Company in the course of an economic strike. Pickets were placed around the entire area, including a special gate used by the employees of Ryan Construction Company which was performing a contract to construct an addition to Bucyrus. Ryan's employees refused to pass the picket line at their gate. The Board in a 4 to 1 decision held the activity did not violate the secondary boycott provisions of the Act:

> "As the record reveals and the Trial Examiner finds, the Respondents, in support of their demands on Bucyrus, proceeded to picket the entire Bucyrus premises, including the gate that had been cut through the fence to provide ingress for Ryan employees to the site of a construction project Ryan was performing for Bucyrus. All this picketing was therefore *primary* picketing. Concededly an object of the picketing was

to enlist the aid of Ryan employees, as well as that of employees of all other Bucyrus customers and suppliers. However, Section 8 (b)(4)(A) was not intended by Congress, as the legislative history makes abundantly clear, to curb primary picketing. It was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary employer. *When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons.* It makes no difference whether 1 or a 100 other employees wish to enter the premises. It follows in this case that the picketing of the Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus,* did not lose its character and become 'secondary' at the so-called Ryan gate because Ryan employees were the only persons regularly entering Bucyrus premises at that gate. While we agree that Section 8 (b)(4)(A) represents an intent by Congress to restrict union action to the 'parties immediately involved', as the dissent states, we do not agree that by picketing the Ryan gate the Respondents were enlarging the area of their disputes. The signs and placards carried by the pickets at the Ryan gate, which were the same as the signs carried at other gates of the Bucyrus premises, were directed at Bucyrus, *not Ryan.* In addition, although only Ryan employees and suppliers had in fact used the Ryan gate before picketing started, Bucyrus employees could always also have entered this gate in order to reach their job location."

The dissenting member of the Board made it clear in his opinion that the Board in its decision in the *Ryan* case

reversed its previous ruling in the *Langer* case and similar cases. The majority of the Board made no effort to distinguish the *Langer* case in their opinion.

In the *Pure Oil Company Case,* 84 N.L.R.B. No. 38, 24 L.R.R.M. 1239, decided June 17, 1949, the Board made a similar ruling that a primary strike does not become illegal because the employees of a second employer refuse to cross the picket line at the site of the labor dispute of the employer engaged in the primary dispute.

We believe that the court below erred in holding that the object of Patterson's act was prohibited by Section 8 (b)(4)(A). That section makes it an unfair labor practice for a labor organization or its agents "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is forcing or requiring any employer . . . to cease doing business with any other person."

The legislative history of the section shows that it was the intent of the Congress to prohibit secondary boycotts which conscript neutrals to the labor dispute. Senator Taft stated succinctly the purpose of Section 8 (b)(4)(A) as follows:

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees" (93 Cong. Record 4323, April 29, 1947).

Although it was undoubtedly the intention of the Congress to reach secondary boycotts, regardless of justification, it is also clear that the section was not intended to go beyond secondary boycotts as defined by Senator Taft in the above quotation.

We contend that the relationship between the general contractor and the electrical subcontractor on this job did not constitute the type of relationship which is covered by the phrase "wholly unconcerned" in the labor dispute.

The majority of the court below was of the view that it made no difference that Giorgi was at work on the same job with Langer and that secondary boycotts are not limited to third parties who are not engaged in the same venture with the unyielding employer. The majority was further of the view that there is no difference between a third person engaged in a common venture with an employer and a third person engaged in an independent relationship with such employer. It held that the relationship between Giorgi and Langer came within the phrase "cease doing business". The court below recognized, however, that certain situations are to be distinguished. Three such categories were listed as open questions:

1. Where the work of the employer may be so enmeshed with that of the third party that it is impossible to picket one without picketing the other. The court conceded that the instant case might have fallen within this category if the picketing had occurred when the non-union employees were at work and Patterson's only purpose had been to induce them to quit.

2. Where the picketing applies pressure to the third person, providing that it also includes pressure against the employer, and

3. Where the supposititious third person is only a disguise for the employer.

The dissenting Judge differed with the majority for the following reasons:

1. Giorgi's act of giving Langer the contract is the very cause of the dispute and the union could therefore set a

picket line which would reach Giorgi within its direct orbit and Deltorto as enmeshed with Giorgi. He also pointed out that the general contractor (Giorgi) secured a direct financial benefit from the employment of a non-union contractor and that all the economic reasons for allowing the union to strive for economic security against Langer apply equally, if not more so, to a like strife against Giorgi.

2. The majority decision leads to anomalous results. The picketing which is prohibited in this case because a contract was let to Langer, would not be prohibited if the general contractor hired the non-union employees directly.

3. The decisions of the Board in *Ryan Construction Corporation* and *Pure Oil Co., supra,* would appear to call for a ruling permitting picketing against a subcontractor which reaches the general contractor as a part thereof.

4. Giorgi was not a "neutral" within the meaning of the phrase as used by this Court in *Carpenters and Joiners Union of America Local Union 313 v. Ritter's Cafe,* 315 U.S. 722, 728.

We contend that the object of Patterson's activities, including the picketing, was to eliminate the non-union conditions on the one construction job which was picketed. The act of picketing was intended to accomplish this objective through any of a number of different means.

In the first place, Giorgi was the active agent in bringing non-union electricians on the construction job. He held the contract for the performance of the entire construction job. It was within his power to employ union or non-union labor. He could do so directly or through subcontractors. Having chosen to establish a non-union condition on the construction job by the employment of Langer, a non-union electrical subcontractor, he could also eliminate the condition by replacing the non-union electricians with

union employees, either directly or through a union electrical contractor.

Under these circumstances, it is entirely clear that Giorgi had a relationship to the dispute which was not limited to the power to cut off Langer from the job. The dispute with Langer was equally, if not more, a dispute with Giorgi who had established the non-union condition.

Secondly, Langer could have signed up with the union after clearing up the legitimate causes of disagreement which had previously prevented the signing of an agreement. This could have been accomplished either through the voluntary withdrawal from employment by the union carpenters on the job or the refusal of the non-union electricians to return to work on a picketed job. The legislative history of the Act is clear in stating that Section 8 (b)(4)(A) of the Act does not prohibit primary strikes for recognition. The conference Report states explicitly that "It is to be observed that the primary strike for recognition (without a Board certification) was not prohibited" (80th Cong. 1st Sess. H. R. 510, pp. 67).

The Board did not find the purpose, or the object, of Patterson's action other than in the general language of the statute (R. 297). The mere fact that non-union electricians were not on the job on the day when Patterson carried his placard at the job does not permit of the conclusion that the picketing was not directed to them. It is entirely unrealistic in the facts of the building trades where crafts come on and go off jobs at various times, to place crucial emphasis on the particular craft or crafts which happen to be on the job when the picketing commences. The picketing constitutes publicity that the job is non-union and the effect of that publicity applies not only to employees on the job but also to crafts which may be in

the position of commencing or, as in this case, returning to work.

Under this latter purpose of Patterson, the fact that the picketing caused a withdrawal of the carpenters from the job would not bring the labor activities in this case under the prohibition of Section 8 (b)(4)(A) since the effect on the employees of Deltorto and the consequent effect on Giorgi were incidental to the permissible purpose of engaging in primary picketing. It is our view that a reading of Section 8 (b)(4)(A) in the light of the legislative history of the Act, shows that the object of labor activities in this case was not to force Giorgi to "cease doing business" with Langer within the meaning of that phrase as used in this section.

In the case of *Mills v. United Association et al.*, 83 F. Supp. 240 (W.D. Mo.) it was held that the relationship between a subcontractor and a principal contractor did not come within the meaning of the term "cease doing business with another person" in Section 303 of the Labor-Management Relations Act, 1947. Section 303 defines prohibited secondary boycotts in the same language as Section 8 (b)(4)(A), but provides for an action for damages in addition to the injunctive restraints provided for violation of Section 8 (b)(4)(A). In dismissing the complaint filed against a local union of the United Association, it was stated:

> " . . . If there is any cause of action alleged, it must be found in the words *'or to cease doing business with any other person'*, and in that connection it will be necessary to determine what is meant, under the Act, by 'doing business'. The allegations of the complaint, which must be taken as true, state that the strike was called or engaged in because the employer was associated with or had contracted with an individual or a group who were obnoxious to the organized labor

group. It is not a question of striking to force the employer to join any group; the absolute reverse is apparent from the pleadings. The term 'doing business' has not been construed by the appellate courts, so far as I can find, in connection with the Taft-Hartley Act. The question was before the district court for the Southern District of New York on January 26, 1948, in *Douds v. Metropolitan Federation of Architects etc.*, 75 F. Supp. 672. Judge Rifkind discussed the question of principal and subcontractor in that case, and held that the parties were 'allies'; that this relationship was brought about by the working conditions growing out of their contract and he refused to determine whether or not the relationship of principal and subcontractor would of itself create the status of ally in such manner as to take it out of the classification of parties 'doing business' with each other. The other instances in which the term 'doing business' has been construed are not sufficiently clear, nor for the most part in point, to be of benefit in this case. In view of the Congressional History of the Act, and the debates in the Senate, it would seem that the relationship between a principal and a subcontractor arising out of the awarding of a subcontract would not within the meaning of the Act be 'doing business' as between the parties. If that were true, it could easily result in a subterfuge and would enable a principal contractor, whose relations with labor and with employees were unfavorable, to hide behind a more favorable relationship of a subcontractor. As said by Judge Rifkind, in the *Douds* case, *supra*, it is my view that the words 'or to cease doing business with any other person' has reference to that which precedes it and must be construed in connection with the question of secondary boycott. It is simply another definition or a further spelling out of the definition of what is necessary to create a secondary boycott. It means

'doing business' as we ordinarily understand it between parties other than those to the particular contract or their allies. For that reason, it is my view that the complaint does not allege a cause of action under section 187 *supra*. (At p. 245).

See also *Douds v. Metropolitan Federation of Architects*, 75 F. Supp. 672.

The close factual relationship between the prime or general contractor and the sub-contractor on a building job has been given legal effect under the State Workmen's Compensation Laws. In *Jennings v. Vincent*, 284 Ky. 614, 145 S.W. (2d) 537, for example, the court held that the general contractor was not "some other person" than the employer within the meaning of the quoted term in a statute giving the injured employee an option to sue such other person under the common law. See *Hill v. American Surety Co.*, 200 U.S. 197.

For all of the above reasons, we contend that the majority of the court erred in its interpretation that Section 8 (b)(4)(A) applies to the labor activities in this case.

We also contend that even if it is assumed that Patterson's acts constituted a secondary boycott prohibited by Section 8 (b)(4)(A) of the Act, nevertheless there was no basis for issuance of the order in this case because Section 8 (c) of the Act immunized the picketing under the facts of the case.

Section 8 (c) follows the enumeration of employer unfair labor practices in Section 8 (a) and union unfair labor practices in Section 8 (b). It provides that

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice *under any of the provisions of this Act, if such expression con-*

tains no threat of reprisal or force or promise of benefit." (Italics supplied.)

It is our view that the Board's affirmation of the Trial Examiner's findings except such as were inconsistent with its own report constituted an affirmation of the Examiner's finding, that in the circumstances of this case the picketing by Patterson and his talks with various parties in this case did not contain any "threats of reprisal or force or promise of benefit". This was also the view of the court below, since it assumed that such was the action of the Board in formulating its conclusions on the subject of the effect of Section 8 (c) in this case (R. 328).

It is our contention that the adoption of this assumption by the court below, which we believe to be correct, required the court to hold that the picketing and Patterson's talks came within the language of Section 8 (c) and therefore did not constitute an unfair labor practice under Section 8 (b)(4)(A) of the Act. The court below has in effect rendered Section 8 (c) empty of any meaning or effect in its possible application to the unfair labor practice provisions of the Act relating to unions, although the provisions of Section 8 (c) continue to have substantial meaning in immunizing certain employer conduct which, previous to the enactment of Section 8 (c), were deemed unfair labor practices under the National Labor Relations Act.

We believe this is directly contrary to the intent of Congress which made a serious point of its desire to give equal freedom to both employers and unions.

The legislative history of the Act shows that the free speech section of the Labor Management Relations Act of 1947 was passed by the House in the following form:

"Sec. 8 (d)(1) Notwithstanding any other provision of this section, the following shall not constitute or

be evidence of an unfair labor practice under any of the provisions of this Act:

"Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if it does not by its own terms threaten force or economic reprisal."

The House Report states with respect to this provision of the Bill, that

"This guarantees free speech to employers, to employees, and to unions . . . nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own expressed terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of Sections 7 and 8 of the amended Act" (80th Congress, 1st Session, House Report No. 245 p. 33).

The Senate Bill as reported, provided that:

"The Board shall not base any finding of unfair labor practice upon any statement of view or arguments, either written or oral, if such statement contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit."

In its report the Senate explained the provision relating to free speech as follows:

"Another amendment to this section would insure both to employers and labor organizations full freedom to express their views to employees on labor matters, refrain (*sic*) from threats of violence, intimation of economic reprisal, or offers of benefit. The Supreme Court in *Thomas v. Collins* (323 U.S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved

the doctrine of the *American Tube Bending case* (134 F. (2d) 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance,* 69 N.L.R.B. 247) or if the speech was made in the plant on working time (*Clark Brothers,* 70 N.L.R.B. 60. The committee believes these decisions to be too restrictive and, in this section, provides that if, *under all the circumstances,* there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence" (80th Cong. 1st Sess. S. Rep. No. 105 pp. 23 - 24). (Italics supplied.)

The Conference Report resulted in the provisions now contained in the statute set forth above as Section 8 (c).

The analysis presented by Senator Taft, who was in charge of the Bill, to the Senate on June 5, 1947, which explained the differences between the Conference agreement and the Senate Amendment, set forth the following explanation of the agreement on Section 8 (c):

"Subsection (c) relating to the right of employers, employees and labor organizations to express opinions and views freely *conforms substantially with the language of subsection 8 (d) (1) of the House bill and is a substitute for section 8 (c) of the Senate amendment.* The House conferees were of the opinion that the phrase 'under all the circumstances' in the Senate amendment was ambiguous and might be susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices. Since this was certainly contrary

to the intent of the Senate, as the accompanying report of the committee with respect to this subsection indicates, *the Senate conferees acceded to the wish of the House group that the intent of this section be clarified.*

"Since the adoption of the conference agreement some inquiries have been received as to whether or not the guarantee of freedom of expression contained in this section is limited to expressions 'which are not printed, graphic. * * *' These words are not words of limitation but were added in the House bill so as to make it clear that freedom of expression was not confined to oral utterances. The language of the report of the House committee makes it clear, moreover, that what the sponsors of the House bill had in mind were primarily oral utterances. There has also been some question raised with respect to the phrase 'constitute or be evidence of an unfair labor practice.' The purpose of this language is to make it clear that the Board is not to use any utterances containing threats or promises of benefit as either an unfair practice standing alone or as making some act which would otherwise not be an unfair labor practice. It should be noted that this subsection is limited to 'views, argument, or opinions' and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law" (93 Cong. Record 6601). (Italics supplied.)

As stated previously, the above legislative history shows the strong intent of Congress to apply the free speech amendment equally to both employers and unions. It also shows that the Congress intended the National Labor Relations Board to predicate its findings on alleged unfair

labor practices on the language contained in the specific expression which was the subject of the allegation.

The extent of the protection afforded by this amendment to expressions is shown most clearly in the Senate Report which disapproved of the "captive audience" rule of the Board and of the Board's practice in relying upon other evidence of unrelated practices in violation of the Act to make an expression of views, otherwise proper, a violation of the Act.

The Board has in fact applied Section 8 (c) in accordance with the expressed intent of Congress insofar as it relates to employers. Thus, the Board, prior to this section of the Act, considered expressions by employers to "captive audiences" as a basis for finding an unfair labor practice. *Clark Brothers Inc.*, 70 N.L.R.B. 802; affirmed 163 F. (2d) 373 (2nd Cir.). The "captive audience" doctrine has been overruled by the Board on the basis of Section 8 (c) in the case of *Babcock and Wilcox*, 77 N.L.R.B. 577.

The effect of Section 8 (c) with respect to employer unfair labor practices has been to immunize expressions of the employer even when such expressions were associated with something more than the utterance itself. The employer cannot be held to have engaged in an unfair labor practice by speech alone even though it is a well known fact that the economic power of the employer makes expressions by him something more than expressions of views by outsiders having no relationship with the employees which can produce benefit or adverse consequence to them. Such expressions are also immunized even though the employer actually exercises his economic power to require compulsory attendance during working time to listen to his expressions with respect to union matters.

It is our view that, if equal effect is given to Section 8 (c) in its application to alleged union unfair labor practices, the picketing under the circumstances of this case is also immunized by Section 8 (c).

It is not our contention that Section 8 (c) immunizes all peaceful picketing and that the line of distinction is to be drawn between violence and non-violence. It has become customary to think of all peaceful picketing as constituting one category. The fact is that there are different types of peaceful picketing, some of which may secure immunity under Section 8 (c) and others of which do not secure such immunity.

We believe that the crucial fact in this case is that the picketing was carried out by the agent of a union which had no power to cause benefit or harm to the union members on the job. This was not a case of picketing by the representative of a union whose members were on the job. Such picketing might well be construed to fall within the exceptions stated in Senator Taft's analysis quoted above, which noted that the language of Section 8 (c) " is limited to 'views, arguments or opinion' and does not cover instructions, directions or other statements which might be deemed admissions under ordinary rules of evidence."

A similar situation not protected by Section 8 (c) of the Act might be presented if the Building Trades Council of the area having disciplinary powers over the carpenters union, or the members thereof, had engaged in the picketing in accordance with its powers. Section 8 (c) might also be inapplicable to a case where there was no picketing but a more subtle or indirect form of inducement to action had been taken by the carpenters union having jurisdiction over the carpenters, to cease work on the job.

In the instant case the agent of the electricians' union which had no employees on the job and which had no power,

direct or indirect, over the carpenters on the job, expressed an opinion that the job was unfair to labor. The picketing could have been disregarded with impunity by the carpenters on the job and it was in fact found, by the Examiner and apparently affirmed by the Board and the court below, that there was no threat of reprisal or force or promise of benefit contained in the picketing and other talks made by Patterson. We contend that this finding carries with it the conclusion that Section 8 (c) does apply to the facts in this case. The court below apparently realized that it was reading out of the Act any real effect of Section 8 (c) in its application to union unfair labor practices. Its conclusions were based largely on the view that to give Section 8 (c) a meaning as broad as its language would result in nullifying other provisions of the Act. The court below specifically referred to the language of Section 8 (b)(2) which prohibits "causing or attempting to cause" an employer to violate the union security provisions of Section 8 (a) (3). The court said:

> "We do not believe that Congress meant to allow a union to persuade an employer so to discriminate even though it does so without threats or promises."

A similar view was taken with respect to the language of Section 8 (b) (2) which forbids "causing or attempting to cause" an employer to discriminate against an employee because he had been put out of a union for any reason but failure to pay his dues. (R. 328-329).

The National Labor Relations Board has pointed out with respect to this very issue that:

> "The words 'cause or attempt to cause' also clearly imply something more than a bargaining demand. It is noteworthy that the words 'persuade or attempt to persuade' were used in Section 8 (b) (2) in the Senate bill as originally passed, but were changed in conference to 'cause or attempt to cause'. In explaining this

substitution, Senator Taft said that the House conferees had objected to the language 'on the ground that it seemed inconsistent with the provision guaranteeing all parties freedom of expression'" (In the matter of *International Typographical Union* 86 N.L.R.B. No. 115, 25 L.R.R.M. 1002).

It will thus be seen that it was the direct intent of Congress, based on its interpretation of Section 8 (c) of the Act, to prevent Section 8 (b) (2) from having the broad meaning relied upon by the court below in explaining its position which renders Section 8 (c) nugatory insofar as the union unfair labor practice sections of the Act are concerned.

The court below also ruled that Section 8 (c) could not be applicable to Section 8 (b)(4)(A) since that would excuse a union or its agent which induces another union to strike for any of the four purposes forbidden in that section. It relied upon the common law theory establishing criminal or tortious liability for one who advises the commission of a wrongful act. We respectfully contend that the court below overlooked the fact that Section 8 (b)(4)(A) must be taken in conjunction with Section 10 of the Act and its overriding purpose of freeing commerce from obstructions. Section 8 (b)(4)(A) is not intended to punish for wrongs committed. It is rather intended to restrain the performance of actions which are deemed injurious to commerce. The purpose of Congress is achieved by providing for the enjoining of the union which has been induced by another union to commit a prohibited act, since it is the induced union which has jurisdiction over the employees who are engaging in the strike or concerted refusal to work.

Finally, the court below apparently interpreted Section 8 (c) as covering utterances which contain more than bare inducements and are accompanied by discursive argument

(R. 330-331). This interpretation is based apparently upon the language of the Senate Report indicating that Section 8 (c) was intended to adopt the rule announced by this Court in *Thomas v. Collins*, 323 U.S. 516. It should be noted that the picket sign carried by Patterson stated merely that "This job is unfair to organized labor". The placard also carried the identifying number of the local union of the I.B.E.W. "501", of which Patterson was the business representative (R. 258). We believe that the measure of protection afforded by Section 8 (c) of the Act is not determined by the relative length of the opinion expressed by the party who becomes the subject of an unfair labor practice complaint. There was not contained in this expression any "threat of reprisal or force or promise of benefit" and it, therefore, should have been held immune under Section 8 (c) of the Act.

2. If Section 8 (b)(4)(A) of the Act was properly interpreted by the court below as applying to the facts of this case, it is our further contention that the enforcement of the order prohibiting peaceful picketing would probably be in conflict with applicable decisions of this Court under the First Amendment on the scope of the constitutional protection of peaceful picketing in labor disputes.

This Court has recently decided a number of cases which restrict the language of earlier decisions on picketing as free speech to the facts of such earlier decisions (*Teamsters v. Hanke*, Nos. 309 and 364 fn. 6, *Hughes v. California* No. 61, and *Building Service Employees International Union, Local 262 v. Gazzam*, No. 449, U.S. Sup. Ct. May 8, 1950).

The effect of these decisions is to permit the restraint of peaceful picketing which is intended to violate public policy as announced by state legislation, or even by a state court, in the absence of legislation. There is nothing in these

decisions, however, which reverses the holdings of the earlier cases.

Thus, it is stated in *Teamsters v. Hanke, supra,* that:

> "What was *actually decided* in *American Federation of Labor v. Swing, 312 U.S. 321, Bakery and Pastry Drivers and Helpers Local v. Wohl,* 315 U.S. 769, and *Cafeteria Employees Union v. Angelos,* 320 U.S. 293, does not preclude us from upholding Washington's power to make the choice of policy she has here made. In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute." (Italics supplied.)

The continuing validity of the holding in the *Swing* case, *supra,* was further indicated by this Court in the *Gazzam* case, *supra,* as follows:

> "The state has not here, as in *Swing,* relied on the absence of an employer-employee relationship. Thus, the state has not as was the case there, excluded workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. 312 U.S. at 326."

These recent decisions of this Court do not establish the rule that all peaceful picketing is removed from the protection of the First Amendment. Question is, therefore, raised whether under the holdings on this point, the ruling of the court below applying Section 8 (b)(4)(A) to the facts of this case is violative of the First Amendment.

The court below, in its consideration of the constitutional issue of free speech, concluded that there was no

absolute protection of picketing as such (R. 331-332). This is not our contention.

We urge that the drawing of the line of permissible contest under the interpretation of Section 8 (b)(4)(A) by the court below is unreal in the light of the facts of this industry and, therefore, does not constitute a sufficient factor to balance the abridgement of freedom of expression in this case.

With respect to this latter point, the court below stated that "Congress, in the search for a compromise between the conflicting interests of employees in collective bargaining and that of *neutrals* in avoiding involvement in *quarrels not their own*, decided to draw a line at *secondary boycotts;* and the propriety of the decision is not for us" (R. 332). (Italics supplied.)

We respectfully submit that the court below assumed certain conclusions which are not consistent with the record or with decisions of this Court.

In *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe* 315 U.S. 722, this Court in a five to four decision upheld a restraint on picketing under the State anti-trust statutes where building and construction unions picketed a cafe owned by Ritter because Ritter had let a contract for the construction of a building completely unrelated to the cafe, and one and one-half miles away from the cafe, to a contractor who employed non-union men.

The majority of this Court emphasized the fact that the prohibition was directed against a business (the cafe) wholly outside the economic context of the real dispute (at the building project) and distinguished the *Swing* case, *supra*, on the ground that there circumstances existed where there was an "interdependence of economic interest of all engaged in the same industry."

In the instant case, the facts do not raise a question of picketing an unrelated industry; the picketing was not only in the same industry but on the very job where the dispute had its *situs*. Furthermore, the interdependence of economic interest was a substantial factor not only in the electrical contracting industry but also for the employees on the particular job. Non-union rates on the dwelling house at Greenwich, Connecticut were of direct interest to electricians in the area; they were also of direct interest to the carpenters and other union trades working on the dwelling house, for it is a commonplace that non-union rates in one craft or trade have a necessary downward effect on the rates paid to other crafts or trades in the same construction job.

The importance of this interdependence of employee self interest has been given constitutional recognition by this Court in the *Swing* case, *supra*. There a judgment holding that an injunction should issue against the picketing of a beauty shop by a stranger union which did not have an employer-employee relationship with the shop, was reversed on the following grounds: "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become commonplace. *American Foundries v. Tri-City Council*, 257 U. S. 184, 209. The right of free competition cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be based because of concern for the economic interest against which they are seeking to enlist public opinion than could the

utterance in *Thornhill's* case." *Ibid.*, 312 U. S. 321, 326. See *Cafeteria Employees Union v. Angelos*, 320 U. S. 292.

In the instant case, a reading has been given to Section 8 (b)(4)(A) of the statute as meaning literally that picketing is prohibited if it has the effect of requiring one employer to discontinue *any* business relationships he may have with *any other* person (R. 327). We have contended, *supra*, this was not the intent of the Congress. We respectfully submit that, if it is, then the Congress has drawn a line of permissible contest which is as arbitrary as the line struck down by this Court in the *Swing* case.

We respectfully submit that the constitutional justification for the restraint of peaceful picketing can not be found in the arithmetic fact that more than one employer's economic interest is adversely affected by such picketing. Certain secondary business relationships may be protected against the consequences of peaceful picketing because the peaceful picketing adversely affects an innocent neutral to the dispute. We contend, however, that all secondary business relationships cannot justify abridgement of freedom of expression merely because they are secondary relationships.

In the instant case Giorgi, the general contractor, was not an innocent third party to the labor dispute. He caused it by employing non-union electricians (through Langer) on the work he had contracted.

The picketing did not occur at another establishment or in another industry. It occurred on the very job where the non-union electricians were employed and which the union deemed to be unfair.

Under these facts, it is our contention that the same considerations which lead to the conclusion that the labor activities in this case did not constitute a secondary boycott prohibited by Section 8 (b)(4)(A) also lead to the

conclusion that, if Congress intended the prohibition to apply, there is a violation of the freedoms of the individual which the First Amendment seeks to protect.

This is particularly true in the building and construction industry where there is always more than one employer on even the smallest job. Peaceful picketing for whatever reason, if successful, can always be construed as having been the effective agent in causing the termination of a literal "secondary" business relationship. The economic facts of this industry coupled with the broad phase "an object" in Section 8 (b)(4)(A), if interpreted literally and without relation to the intent of Congress as discussed *supra,* would mean that any strike or picketing for economic reasons or organizational objectives would be enjoinable because of its effect on the multiple employer relationships on the job. We believe that although the Congress intended to apply stringent restrictions to labor by means of the Act, it did not intend to go as far as prohibiting strikes or picketing for organizational or economic objectives (See Conference Report on the Act, 80th Cong. 1st Sess. H. Rep. No. 510 p. 43; 93 Cong. Record 3950). In this connection, we wish to urge that the intent of Congress was evidenced by the statements of the majority Congressmen in charge of the Bill; not by the minority which was seeking to convince the country of the utterly destructive effects of the proposed legislation. If it is held, however, that the Congress intended such a result, we contend the Act is violative of the First Amendment.

3. The instant case also raises the question of whether the jurisdiction of the National Labor Relations Board applies to an essentially local labor dispute with only the most remote, if any, effect upon commerce. This question is of substantial importance in the building trades industry because of the large number of small building construction

jobs similar to the construction job in the instant case. The Supreme Court has not ruled on the applicability of the Labor Management Relations Act or of the National Labor Relations Act to the building and construction industry because the Board has only recently asserted jurisdiction over this industry. During the entire period of the National Labor Relations Act the Board did not assert jurisdiction over the industry.

The court below based its conclusions that Patterson's act "did affect commerce" within the meaning of the Act upon the general status of Langer as well as the general status of Giorgi, in addition to the activities involved on the construction of the dwelling at Greenwich, Connecticut. We believe that this was error because there was no finding by the Board that the acts of Patterson on behalf of the local union were directed against any of Langer's activities off the Greenwich, Connecticut job. Indeed, the Board dismissed the complaint insofar as it alleged that the petitioners herein violated Section 8 (b)(4)(A) by threatening to induce or encourage employees or employers other than Nicholas Deltorto or Giorgi Construction Company to strike or refuse to perform service in order to force certain other employers to cease doing business with Samuel Langer (R. 298-299).

Thus the Board affirmatively found that there were no actions directed against Langer in any set of facts other than the facts of the particular construction job in question. This conclusion is made particularly clear by the statement of the Chairman of the Board who cast the deciding vote in favor of asserting jurisdiction, not upon the plenary power of the Board to act in the case but because "the very controversy before the Board arose out of an interstate transaction in which New York contractors

were engaged in the construction of a residence in the State of Connecticut" (R. 296).

We therefore contend that the question of commerce in this case must be confined to the activities on this job rather than the considerations relied on by the court below with respect to the general business of Langer and Giorgi.

The court below recognized that the interstate activities in this case were insignificant (R. 326). The court went on to rule, however, that "they were enough to satisfy the demands of the Act" (R. 326). We respectfully differ from the conclusions of the court below in this respect and contend that analysis of the actual facts in the record will show that the assertion of jurisdiction in this case would extend the Federal power to an area where the Congress did not intend to apply it.

Langer's contract for the performance of electrical work was in the total amount of $325 (R. 53). The total purchase price of the private dwelling house was $15,200 (R. 40). There is no direct evidence in the record as to the value of the materials which Langer was to make available for the job, but on the assumption of the Trial Examiner that the proportion of materials to the total cost of the electrical work was one-third of the contract price (R. 248, fn 12), the cost of the materials would have been approximately $110. The other evidence with respect to materials showed that approximately $1800 of masonry supplies was required for the job (R. 54). There was no evidence on the cost of lumber and whatever lumber was used on the job was secured from a lumber yard located in Connecticut (R. 126-129). The record shows that Langer had completed approximately 60% of the electrical work for which he had contracted (R. 248). There is no evidence in the record that the completed work did not include all the materials required for the performance of the electrical work nor

is there any evidence to show that if there were further materials required on the job that such materials had not already been delivered and allocated to the job.

The record is equally devoid of evidence to show that any further deliveries of masonry, materials or lumber were required for the job.

The entire stoppage on the job lasted for only a few days and there is no evidence to show that the stoppage had or could have had any effect on the flow of building materials to the place where the construction work was to be performed (R. 324).

Thus there was no evidence to support a finding that the picketing affected the flow of commerce. We contend that the facts that Langer had his official headquarters in New York and was performing a contract in Connecticut and that he had to go from New York to Connecticut in connection with this job did not in themselves supply the facts required to support an exercise of the federal power under the Act. This Court has held that original construction is not commerce. *Murphey v. Reed*, 335 U.S. 865. This ruling has rendered the Fair Labor Standards Act inapplicable to the building and construction industry except insofar as employees are involved in the ordering and receiving of materials from outside the state. If the residence of Langer outside the state of construction brings this case within the concept of interstate commerce, then the Fair Labor Standards Act should apply to any construction employee who crosses a state line to arrive at his place of work. It has been held, however, that a construction employee is not engaged in commerce even if he has worked on the particular job outside the state where he normally works and which is the residence of the employer. *Barbe v. Cummins Construction Co.*, 49 F. Supp. 168 (D.C. Md.) affirmed 138 F. (2d) 667 (4th Cir.). The

out of state residence of Giorgi is equally irrelevant to the determination of the question of commerce in this case.

We further contend that even if the record showed that Patterson's acts affected the flow of commerce there was nevertheless no basis for the assertion of federal jurisdiction under the *de minimis* doctrine which is applicable to the interpretation of the commerce provisions of the Labor Management Relations Act of 1947.

The question of what comes within the commerce clause and what falls without the clause is essentially a matter of making distinctions between degrees of difference. It is obvious that almost any economic or labor activity, no matter how local in nature, can be related to interstate commerce by a verbal chain of causation. If this were the rule of law, however, the status of our dual system of government and the substantive powers of the States would be the subject of mere lip service.

There must be a close and substantial relationship to commerce before the conclusion can be drawn that a labor dispute "affects commerce." No simple rule exists for making the determination. As stated by this court in dealing with a related problem of interpretation of the Fair Labor Standards Act:

> "The attempt to achieve a form of words that could avoid an exercise of judgment that a particular occupation is more in the nature of a local business than not, is merely to be content with formulas of illusory uncertainly . . . we cannot escape the duty of drawing lines." *10 East 40th Street Building, Inc. v. Callus.* 325 U.S. 578.

In cases where this court has sustained jurisdiction, under the Act, on the ground that the labor activities affected commerce, a study of their facts clearly shows there was present in each of these cases, the necessary close, and substantial relationship to interstate commerce. That

relationship made control of the activities in question necessary and appropriate in order to protect commerce from burdens and obstructions. As stated by this court in *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 301 U.S. 1.

> "Although activities may be intra-state in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schecter Corporation v. U.S.—Undoubtedly, the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree.*" (Italics supplied.)

In *Santa Cruz Fruit Packing Company v. N.L.R.B.*, 303 U.S. 453, the source of the materials was local, but substantial sale of the product was made in interstate commerce.

In *Consolidated Edison Company v. N.L.R.B.*, 305 U.S. 197, although the source of the materials and production and distribution of its product was local, it nevertheless appeared that a substantial part of the company's product was supplied to instrumentalities of interstate commerce.

In *N.L.R.B. v. Fainblatt*, 306 U.S. 601, a local processor, received materials belonging to others, in interstate commerce and after processing, distributed the material back through interstate commerce in a continuous day-by-day inflow of shipment to and from his factory.

In *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, in an action brought under the Federal anti-trust act, a monopoly and conspiracy was shown to affect interstate commerce by an agreement among sugar beet refiners, who constituted the only available market for sugar beets grown in their locality, where the price to growers with whom they contracted was based on average net returns of all rather than the separate return of the purchasing refiner. The sugar was sold by the refiners directly in interstate commerce and once converted from beets into sugar started on interstate journeys to the tables of the nation.

The Court may also wish to take into account a decision by Federal District Judge Duncan in a civil suit for damages under Section 303 of the Act that the construction of a Coca-Cola bottling plant is not subject to the commerce provisions of the Act. *Mills v. Plumbers Union, supra.*[1]

Although the court below relied on the decision of this court in *Polish National Alliance v. N.L.R.B.*, 322 U. S.

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[1] Although the definition of commerce in the Anti-Trust Law differs somewhat from the definition of the Labor-Management Relations Act, 1947, the rulings of the courts under the former statute are of assistance in determining the legal weight to be assigned the factor of inflow of materials. The inapplicability of the Anti-Trust Laws to the electrical contracting industry on grounds of lack of commerce has been discussed in detail by Federal District Judge Yankwich in *U. S. v. San Francisco Electrical Contractors Association Inc., et al* (1944) 57 F. Supp. 57, (N. D. Calif.). " . . . the electrical contractor processes the electrical articles into a combination which he sells at a price, in which enters *as only one* of the elements, the price of the articles. When articles originating in interstate commerce thus become co-mingled in a locally completed process, *they are not* in the flow of commerce."

643, it gave no effect to the careful reservation of this court that:

> "The inter-relations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity."

Reference to the facts in that case—under the principle that the facts in a decision must be carefully reviewed in determining the scope of the language of the court, as announced in recent decisions of this court—shows that the insurance company had outstanding benefit certificates in the amount of nearly 160 million dollars, that its assets totaled approximately 30 millions dollars and that stoppage or disruption of the company's operations would have a substantial effect on commerce in terms of the flow of bills, notes and policies into and out of the state, the making of loans on policies in and out of the state, and the credit relationship of the company to interstate industries, railroads and public utilities. Obviously, no such set of facts is presented here.

The decision of this Court in *N.L.R.B. v. Jones and Laughlin Steel Corporation,* 301 U.S. 1, which is relied upon by the court below, involved the effect of the activities of one of the largest steel companies in the United States on commerce, and *N.L.R.B. v. Fainblatt,* 306 U.S. 601 also relied upon by the court below, involved a garment manufacturing company employing approximately 200 employees.

The court below relied upon a "commerce" decision of the U. S. Court of Appeals for the Tenth Circuit (*United*

Brotherhood v. Sperry, 170 Fed. 2nd 863, 867) but omitted any mention of a subsequent decision of the same Circuit Court of Appeals in a case more applicable to the instant case. *Groneman v. I.B.E.W. Local 354* 177 F. (2d) 995.

In the *United Brotherhood* case, decided November 2, 1948, the Tenth Circuit Court of Appeals held the "commerce" provisions of the Labor Management Relations Act of 1947 applicable to a product boycott directed against an interstate supplier of materials. In the *Groneman* case the same Court of Appeals drew a clear distinction between such a secondary boycott and picketing of a non-union electrical contractor on the job where it held that the *de minimis* doctrine prevented the application of the Act to an essentially local dispute. The labor dispute in the *Groneman* case arose out of the employment of a non-union electrical contractor and the court held that the picketing carried on by the I.B.E.W. local in that case did not affect commerce even though it assumed that the interruption of interstate commerce was to the extent of $6,000. The court stated that

> "In *Labor Board v. Fainblatt,* 306 U.S. 601, 607 the Supreme Court said that considering the Act in light of its purpose and circumstances in which it must be applied, it found 'no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*'
>
> "Considered in the light most favorable to appellant, the impact of this labor dispute upon commerce, in any event, is so trifling and microscopic as to bring it within the above pronouncement by the Supreme Court and requires the application of the *de minimis* doctrine. For this reason, we think the court correctly concluded that the controversy fell outside the pur-

pose and provisions of the Act and that the court was without jurisdiction." (At pp. 997-998.)

We contend that if the opinion of the Tenth Circuit Court of Appeals is correct that the *de minimis* doctrine is applicable to a question of jurisdiction arising under the Labor Management Relations Act of 1947, the facts in this case are well within the scope of such doctrine. This court in the case of *Mabee v. White Plains Publishing Co.* 327 U.S. 178 cited with apparent approval the reference in the *Fainblatt* case to the *de minimis* doctrine in its application to the National Labor Relations Act as distinguished from the Fair Labor Standards Act.

We believe that the Tenth Circuit Court of Appeals was correct in applying the *de minimis* doctrine in the *Groneman case.* We also contend that regardless of the insubstantial differences in the facts as between the *Langer* and *Groneman* cases, there is a conflict between the Circuits in the failure of the U. S. Court of Appeals for the Second Circuit to apply the *de minimis* doctrine to the *Langer* case.

This Court has stated in the case of *United States v. Yellow Cab Company,* 332 U.S. 218, 231, that "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." The application of this view in terms of actual decisions is vital to the maintenance of our system of dual sovereignties. Application of the Labor Management Relations Act, 1947, to the essentially local dispute involved in the instant case represents a final step in the complete erosion of the concept that there is an area of economic activity which is reserved to the states. Certainly, the normal and accepted course of business does not admit of the view that the picketing of a small private dwelling house under the circumstances of this case, represents an act which has the

necessary substantial and intimate relationship to commerce which is required for the assertion of the federal power under this Act.

4. Petitioners are entitled to have a clear order on their duties, if it should be held that they have violated the Act, and to have the order based on appropriate findings.

The order as written is in conflict with Section 8 (b) (4)(A) of the Act which permits secondary boycotts where intended to force recognition of a certified union. If such a case were to arise, there would be no clear understanding of the scope of the order.

Furthermore, the order in this case is probably in conflict with rulings of this and other courts on "blanket" orders. There was no finding by the Board that the acts of petitioners on the Giorgi job will probably be applied on jobs of other employers. Indeed, the Board dismissed that part of the complaint which alleged that Local 501 and Patterson had threatened to induce or encourage employees of employers other than Deltorto or Giorgi to strike or refuse to perform services in order to force said other employers to cease doing business with Langer. Nevertheless, the order as formulated by the Board and approved by the court below requires petitioners to

> "cease and desist from inducing or encouraging the employees of Nicholas Deltorto, or *any employer*, by picketing or related conduct, to engage in a strike or a concerted refusal in the course of their employment to perform any services, where an object thereof is to force or require Giorgi Construction Company, or *any other employer or person* to cease doing business with Samuel Langer" (R. 298, 336). (Italics supplied.)

See *N.L.R.B. v. Federal Engineering Co. Inc.* 155 F. (2d) 17 (6th Cir.); *May Department Stores Co. v. N.L.R.B.*, 326 U. S. 376.

CONCLUSION

The questions raised by the decision of the court below on sections of the Labor-Management Relations Act of 1947, which have not as yet been the subject of rulings by this court, are of vital importance to all of organized labor in the United States and, in particular, to the building and construction industry which employs approximately three million persons.

The destruction of traditional methods of organization in this and other industries betokens serious consequences to the labor organizations involved in these industries and to the conditions of labor of their membership.

The course of decision in this case shows the sharp conflict of opinion among the administrative officials and judges who have considered it. The Trial Examiner recommended dismissal of the case, the Board rejected his recommendations by a divided vote of three to two and the court below sustained the Board's action by a division of two to one.

It is respectfully submitted that the questions raised by the decision below merit final determination by this court and that this petition for a writ of certiorari should be granted.

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APPENDIX

The pertinent provisions of the National Labor Relations Act, as amended (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 et seq., as amended by the Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session, 29 U. S. C., Supp., 151 et seq.) are as follows:

Sec. 2. When used in this Act—

* * * * * * *

"(6) The term 'commerce' means trade, traffic, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * *

Section 8.

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"(b) It shall be an unfair labor practice for a labor organization or its agents—

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"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services where an object thereof is: (A) forcing or requiring any employer or self-

employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representatives of such employees under the provisions of Section 9; * * *

* * * * * * *

"(c) The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * * *

Section 10. "(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this

Act or has received a construction inconsistent therewith.

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"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4 (A), (B), and (C) of Section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is

filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint shall issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law; *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony; *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situa-

tions where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

* * * * * * *

Sec. 303. "(a) It shall be unlawful, for the purposes of this section only in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other persons;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of of such employees under the provisions of section 9 of the National Labor Relations Act;

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such em-

ployer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representatives for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Sec. 501. "When used in this Act—

"(1) The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

"(2) The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

"(3) The terms 'commerce,' 'labor disputes,' 'employer,' 'employee,' 'labor organization,' 'representative,' 'person,' and 'supervisor' shall have the same meaning as when used in the National Labor Relations Act as amended by this Act."